Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of The United States

October Term , 1995

No. _____

David A. Nowicki,
Petitioner,
v
Ms. Lucy Cooper,
Respondent.

Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Seventh Circuit.

Petition for Writ of Certiorari

David A. Nowicki
2000 Capella Ct.
Waukesha, WI 53186
414-521-9162

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Questions Presented

1. Does a family court commissioner have personal liability for damages to the paralegal she prevented from earning a living by providing paralegal services for an attorney during a hearing?

The Seventh Circuit Court of Appeals, Chief Judge Posner and Circuit Judges Fairchild and Kanne say no!

2. Does a family court commissioner have personal liability for damages to the paralegal she prevented from earning a living by providing paralegal services to a fellow member of a civil rights organization (Divorced Dads Against Discrimination) during a hearing?

The Seventh Circuit Court of Appeals, Chief Judge Posner and Circuit Court Judges Fairchild and Kanne say no!

3. Is the refusal of the family court commissioner to permit a paralegal that was hired to work on the case with the attorney that is representing the client a ministerial act or a judicial act?

The Seventh Circuit Court of Appeals, Chief Judge Posner and Circuit Court Judges Fairchild and Kanne say it is a judicial act and not ministerial, therefore, the court commissioner has absolute immunity!

Parties to the Proceedings

1. The Plaintiff-Appellant, David A. Nowicki, is a resident of the State of Wisconsin.

2. The Defendant-Appellee, Ms Lucy Cooper, is a resident of Milwaukee County.

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In The

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No. _____

David A. Nowicki, in pro per
a non attorney
Petitioner,

v

Ms. Lucy Cooper,
Respondent

Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Seventh Circuit.

Petitioner for Writ of Certiorari

Opinions Below

The final opinion of the Seventh Circuit Court of Appeals was decided by Chief Judge Posner and Circuit Judges, Fairchild & Kanne. The decision of the district court was reversed in part and remanded. The matter was submitted on 4-21-95 and decided on 6-1-95. A copy of the decision is attached in the appendix marked as App. 1 pp.1-5.

Jurisdiction

An opinion of the United states Court of Appeals for the Seventh circuit was rendered on 6-1-95.

This Petition for a Writ of Certiorari is being filed pursuant to Rule 13.1 & 13.4 of the Rules of the United States supreme Court.

This court has jurisdiction over this proceeding pursuant to 28 USC 1254 and United States Supreme Court Rules 10.1

Statement of the Case

The plaintiff, David A. Nowicki, a non-lawyer, in proper person and is one of the co-founders and current manager of the Divorced Dads' Organization. He is a notary public, paralegal and is also listed as a community service provider by the Family Court Commissioner's publications in Waukesha County. The plaintiff is paid a $40 hourly fee for the services he provides to fellow members. Women's organizations throughout the State of Wisconsin provide the same services that Nowicki provides, however, they are paid a flat fees for their services.

The defendant, Ms Lucy Cooper, is a lawyer that has been hired to serve as an assistant family court commissioner for the Milwaukee County Court system. She is salaried.

The principle parties in the underlying state case are fellow members of the Dads' Organization, Randy Weishar and Richard Grabczyk. The attorney that represented Randy

Weishar in Milwaukee County is Frank J. Schiro. Richard Grabczyk's case is still pending and will be pending for several more years. Randy Weishar's cases is still pending in Milwaukee County and will be for the next ten years.

It is the plaintiff's chosen profession to provide paralegal services to fellow members of the Dad's organization for their litigation teams and as a community service provider pursuant to Wis. Stats. 767.081.

It is the custom, practice and policy of the defendant commissioner and all judges and commissioners, presently and in the past sitting judges and court commissioners to permit lawyers to have second attorneys, paralegals, law clerks, secretaries and any other assistant they want at counsel table.

It is also the custom practice and policy of the defendant, all other commissioners and judges, both past and present, to permit court reporters to tape record the proceedings in addition to typing with their stenographic equipment.

The defendant denied the plaintiff from making a audio record during the Grabczyk hearing and stated, "I have a standing policy of not permitting anyone to tape record in my court room".

It has been the standing policy of defendant to deny litigants, represented or not, a paralegal, secretarial assistant and notary audio recording services in her non record hearing room. Based upon the defendant's standing policy, the plaintiff was not able to provide the services he was hired for.

The acts of the defendant, Lucy Cooper, are ministerial and not judicial. Her acts have nothing to do with the facts and merits of the underlying family law case.

Nowicki, Weishar & Grabczyk are members of a class of poor and a class of fathers/men that cannot escape their financial and familial responsibilities of the family court system.

The plaintiff was hired by Randy Weishar to work on his litigation team with Attorney Frank Schiro. He was to provide paralegal services, moral support and make a private audio record of the proceedings before the defendant, Ms. Lucy Cooper. Without any provocation or facts to justify her action, Ms. Cooper barred Nowicki from the spacious 20 passenger hearing room. It was explained to her, by Attorney Schiro, that the plaintiff was hired to provide paralegal services and to make a private audio record of the proceedings. The hearings are not recorded by a court reporter. During the next 14 months, Ms. Cooper repeatedly denied the plaintiff Nowicki access to the hearing room whenever the Weishar case was being heard.

On the Richard Grabczyk case, the plaintiff was hired by the unrepresented non-attorney fellow member father to provide moral support, make a private audio record of the proceedings and to serve him in the capacity of a secretary. The family court commissioner's hearing are not recorded hearings. In this case, Ms. Cooper would not let the Plaintiff do anything except sit quietly in the chair against the wall far from Richard Grabczyk. Mr Grabczyk objected and the defendant ignored his objections.

The plaintiff lost part of his fees on both of the above

mentioned cases. Neither party will hire him anymore and they will not recommend his services to any other father that is facing the family court system. The plaintiff's reputation is ruined and his future income from these fathers and their referrals is finished.

The plaintiff filed an action for supervisory relief in the Wisconsin Appellate Court system, case no. 93-171 W State ex rel. Nowicki v Lucy Cooper, Assistant Family Court Commissioner, et al. On 7-9-93, the appeal for a supervisory relief was dismissed and the court stated Nowicki had no standing to bring the action to the Court of Appeals.

On 7-27-93, the plaintiff filed a 42 USC 1983 civil rights action seeking declaratory relief, injunctive relief and damages against the defendant personally and in her official capacity. The plaintiff's claim stated Ms Cooper had no immunity due to the fact her actions were ministerial.

On 7-28-93, the eastern district federal court Judge Thomas J. Curran, within 24 hours after the filing of the case and without any hearing, dismissed the plaintiff's case. Judge Curran stated the defendant had absolute immunity and no damages could be sought against her. In the plaintiff's pleadings, he raised the issue of his right to contract which is protected in the federal and state constitution, pursuant to Art. 1, Sec. 10, Cl. 1 of the U. S. Constitution, to enter into a contract. He raised the issue of the deprivation of his right to chose a field of employment which is protected by the "Liberty and Property" concept of the 5th and 14th Amendments of the United States Constitution. The plaintiff further alleged a cause of action under the 14th Amendment for the egregious discrimination by Ms. Lucy Cooper. She will permit an attorney to bring in any paralegal they want to

assist them at any time. She will also, as a matter of policy, permit a private stenographer to make a record of the proceedings. The plaintiff also included a cause of action which stated that a court room is public and the defendant cannot hold secret hearings. For relief, the plaintiff sought declaratory & injunctive relief barring the defendant's conduct in the future and he sought damages against the defendant, personally and in her official capacity. Judge Thomas J. Curran dismissed the case.

On 10-12-93, the plaintiff filed an appeal in the Seventh Circuit Court of Appeals seeking to reverse the districts court's decision. The plaintiff maintained that he was not an attorney and regardless how unartfully his complaint was drafted, the district court had the duty to most liberally construe the pleading of a pro se litigant. In his brief, the plaintiff raised the issue of a wrongfully dismissed pro se complaint, failure to grant a hearing prior to dismissal, the federal questions raised by the plaintiff and his right t contract his services.

On 6-1-95, the Seventh Circuit dismissed the plaintiff causes of action for damamges against the defendant stating she had immunity and no damages could be obtained. The court remanded the balance of the issues to the district court for further proceedings.

It is from the 6-1-95 decision that the plaintiff appeals to the United States Supreme Court for a Writ of Certiorari.

Argument on Immunity

To make a determination as to whether a judge or a

court commissioner has judicial immunity or not requires a two part test. Judges do not have absolute immunity for ministerial acts. They do have absolute immunity if they have jurisdiction and their act is judicial.

The application of the doctrine of absolute immunity is restricted to the following areas: (1) immunity applies only when judges are faced with suits involving their judicial as opposed to their ministerial or administrative duties, and (2) immunity applies only when officials are sued for damages, see Forrester v White 108 S. Ct. 538, 543-545 & Doe v Lake County , Indiana, D.C. Ind. 1975, 399 F.Supp.553

To determine if a state court judge is entitled to judicial immunity in a civil rights action, the district court must apply two-part test inquiring as to whether judge's actions were made while acting in his judicial capacity, and, if so, whether or not judge's actions fall clearly outside judge's jurisdiction as Florida circuit court judge; if both parts of test are met, judge is absolutely immune from liability under Civil Rights Act. Clark v Sierra, M.D. Fla.1993, 837 F.Supp. 1179

Argument regarding liability when Court Commissioner violates the rights of an individual

The plaintiff was engaged in perfectly lawful conduct when the defendant denied him the right to make a living. The plaintiff had engaged in a lawful contract to provide services to the fellow members. That right to contract is protected under the United States Constitution Art. 1, Sec 10, Cl 1. This clause is only a limitation of state powers, no cause of action based on this theory lies against the United States government. If a contract, when made, was valid by

the constitution and laws of the state, as then expounded by the highest authorities whose duties it was to administer them, no subsequent action by the legislature or judiciary can impair it obligation. Havemeyer v Iowa County, Wis. 1865, 70 U.S. 294, 3 wall 294, 18 L.Ed. 38. A contract is "impaired when a party is deprived of benefit of his contract by law. Tower Plaza Investments Ltd. V DeWitt, 1973, 508 P.2d 324, 109 Ariz. 248, appeal dismissed 94 S.Ct. 853, 414 U.S.1118, 38 L.Ed2d 746.

In Aldabe v. Aldabe, C.A. 9 (Cal.) 1980, 616 F.2d 1089, the court said, when a judge violates a litigants rights, that act is not judicial and they lose their immunity.

Arguments Regarding Ministerial Act versus Judicial Acts

In the following cases the courts have made decisions which describe ministerial act:

In State v. Sullivan, C.C.N.C. 1982, 50 F. 593, the court said, Congress has imposed ministerial duties upon judges. In Quarles v. U.S., D.C.App.1975, 349 A.2d 690, certiorari denied 965 S.Ct. 2169, 425 U.S. 972, 48 L.Ed.2d 795, the court said, some communications between the court and the jury are ministerial. In, Bense v. Starling, C.A.Ill.1983, 719 F.2d 241, the court said, when no parties are involved in a motion, the motion is a ministerial act. In Curry v. Carr, Tex.Cr.App.1992, 847 S.W.2d 561, the court said, a duty to conduct a jury trial is a ministerial act. In People v. Gonzalez, 1990, 800 P.2d 1159, 51 C.3d1179, 275Cal.Rptr. 729, certiorari denied 112 S.Ct. 117, 502 U.S.

835, 116 L.Ed.2d 85, the court said, a temporary replacement judge's acts were ministerial. In U.S. v. Reed, CGCMR 1978, 4 M.J. 869, decision reviewed 6 M.J. 860, the court said, referral of a case by a judge was a ministerial act. In Doe v. Lake County, Indiana, D.C.Ind.1975, 399 F.Supp. 553 the court said, immunity does not apply to ministerial acts. In Chase Manhattan Bank, N.A. v. Celotex Corp., S.D.N.Y.1994, 852 F.Supp. 226, the court said, entry of a judgement by a clerk is a ministerial act. In Ex parte Steele, D.C.Ala.1908, 162 F. 694, 20 AmBankr.Rep. 446. See, also, In re Ward, C.C.A.N.J.1912, 194 F. 89; In re King, C.C.A.Ill.1910, 179 F. 694, the court said, judges can not pass a judicial duty to a ministerial officer. In Ex parte Virginia, Va.1879, 100 U.S. 339, 10 Otto. 339, 25 L.Ed. 676, the court said, selection of jurors is a ministerial act and not judicial. In Harris v. Harvey, C.A. 7 (Wis.) 1979, 605 F.2d 330, certiorari denied 100 S.Ct. 1331, 445 U.S. 938, 63 L.Ed.2d 772, the court said, acts by a judge outside of his courtroom and not judicial are ministerial acts. In U.S. v. Leyva, C.A.Tex.1975, 513 F.2d 774, the court said, when granting immunity, the act is ministerial. In re Baldinger, D.C.Cal.1973, 356 F.Supp. 153. See, also, Matter of Doe, D.C.Mich.1976, 410 F.Supp. 1163, the court said, in granting immunity the act is ministerial and not judicial, except when a judge is protecting the rights of the witness. In U.S. v. Ursillo, C.A.2 (N.Y.) 1986, 786 F.2d 66, the court said, the failure to attach a transcript the act is ministerial. In U.S. v. Harrington, C.A.Ind.1974, 504 F.2d 130, the court said, failure to attach paperwork is ministerial. In Parnacher v. Mount, C.A.Okl.1953, 207 F.2d 788, certiorari denied 74 S.Ct. 515, 347 U.S. 917, 98 L.Ed. 1073, rehearing denied 74 S.Ct. 626, 347 U.S. 940, 98 L.Ed. 1089, the court said, a decision of the Oklahoma Supreme Court referring to lower court's decision not binding upon the other courts in a

ministerial act. In U.S. v. Cortese, D.C.Pa.1976, 410 F.Supp. 1380, affirmed 540 F.2d 640, the court said, when a clerk has a duty to perform a certain task, their act is ministerial. In re Prines, C.A.8 (S.D.) 1989, 867 F.2d 478, the court said, the calculation of fees which are clearly defined by statute is a ministerial act. In Meeropol v. Nizer, N.Y.1977, 97 S.Ct. 687, 429 U.S. 1337, 50 L.Ed.2d 729, the court said, the acts of a chief judge is purely ministerial. In Morrison v. Olson, Dist.Col.1988, 108 S.Ct. 2597, 487 U.S. 654, 101 L.Ed.2d 569, on remand 857 F.2d 801, 273 U.S.App.D.C. 10, the court said, misc. Functions are ministerial. In Allen v. U.S., C.A.6 (Ky.) 1990, 921 F.2d 78, certiorari denied 111 S.Ct. 2896, 115 L.Ed.2d 1061, the court said, the reading of a judges instructions by a magistrate was a ministerial act. In Merced Rosa v. Herrero, C.A.1 (Puerto Rico) 1970, 423 F.2d 591, the court said, once a formal request has been made, a chief judges duties are ministerial. In California Teachers Ass'n v. Newport Mesa unified School Dist., D.C.Cal.1971, 333 F.Supp. 436, the court said, once a specific request has been made, a chief judge's duties are ministerial. In Leonhard v. U.S., C.A.N.Y.1980, 633 F.2d 599, certiorari denied 101 S.Ct. 1975, 451 U.S. 908, 68 L.Ed.2d 295, the court said, entering a correction of an error in an adjudicated decision is a ministeial act.

In Burbank v. Warden, Illinois State Penitentiary, C.A.Ill.1976, 535 F.2d 361, certiorari denied 97 S.Ct. 750, 429 U.S. 1046, 50 L.Ed.2d 758, rehearing denied 97 S.Ct. 1187, 430 U.S. 911, 51 L.Ed.2d 589a., the court said, enforcement of a final judgement is a ministerial act. In Ingalls Shipbuilding, Inc. V. Asbestos Health Claimants, C.A.5 (Miss.) 1994, 17 F.3d 130, the court said, when a director has a clear duty to transfer a case to a judge is a ministerial act. In Doe v. Lake County, Indiana, D.C.Ind.1975, 399 F.Supp. 553, the court said, there is no

immunity for ministerial acts. In Clark v. Campbell, D.C.Ark.1981, 514 F.Supp. 1300, the court said, there is no immunity for ministerial duties. In Doe v. Lake County, Indiana, D.C.Ind.1975, 399 F.Supp. 553, the court said, immunity only applies in judicial acts.

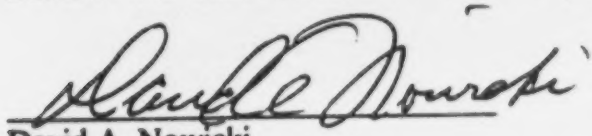
The thought process is simple, whenever a judge has to use his or her discretion to reach a decision with regards to the facts of the case, it is a judicial act. However, when the act requires no discretion, the act is ministerial and there is no immunity.

In Forester v White, 108 S.Ct. 538, 543-545 (1988) Judge Posner was being overly protective of all judges. If his philosophy were permitted to exist in the entire court system, not only would judges be able to fire personnel at will with out any justification whatsoever, they would be able to determine who would be able to make a living in the court system. The acts of the court commissioner in denying the plaintiff a right to make a living, without any justification whatsoever are no different the acts of the county judge in Ex Parte Virginia, 100 U.S. (10 Otto) 339 where the court declined to extend immunity to a county judge for his discriminatory racial jury selection process. If the commissioner is permitted to escape responsibility for her acts, this case will serve a wake up call for any judge or court commissioner to prevent any attorney, court reporter, paralegal or any other court personnel to know that they best never offend any judge or court commissioner for the consequence will mean denial of access and the termination of their ability to make a living in that court. This would lead to a total breakdown of the judicial system.

Conclusion.

It is for all of the above mentioned facts and arguments that the plaintiff requests this court to rule in his favor. The specific relief being requested is to find that Chief Judge Posner and his distinguished colleagues, Circuit Court Judges Fairchild & Kanne, are in error. To further find that the family court commissioner is without immunity and, additionally, to find that the court commissioner is liable for damages. A full reversal of Judge Posner's decision is appropriate and justice requires it.

Dated at Waukesha Wisconsin this 29th day of August, 1995.



David A. Nowicki

2000 Capella Ct.
Waukesha, WI 53186

414-521-9162 off

APPENDIX

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Wis. Statute 767.081

App-2

Opinion of the United States Circuit Court of Appeals dated 6-1-95

App-3

Order of the district Court dated dated July 29, 1993

App-4

App 2

Wisconsin Statutes 767.081.

Information from family court commissioner

(1) Upon the filing of an action affecting the family, the family court commissioner shall inform the parties of any services, including referral services, offered by the family court commissioner and by the director of family court counseling services under Sec. 767.11.

(2) Upon request of a party to an action affecting the family, including a revision of judgment or order under Sec. 767.32 or 767.325:

(a) The family court commissioner shall, with or without charge, provide the party with written information on the following, as appropriate to the action commenced:

1. The procedure for obtaining a judgment or order in the action.

2. The major issues usually addressed in such an action.

3. Community resources and family court counseling services available to assist the parties.

4. The procedure for setting, modifying and enforcing child support awards or modifying and enforcing legal custody or physical placement judgments or orders.

(b) The family court commissioner shall provide a party, for inspection or purchase, with a copy of the statutory provisions in this chapter generally pertinent to the action.

App-3-1

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-3100

DAVID A. NOWICKI,

Plaintiff-Appellant,

v.

LUCY COOPER, Assistant Family Court Commissioner, Milwaukee County, both personally and in her official capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93 C 779—Thomas J. Curran, *Judge.*

SUBMITTED APRIL 21, 1995—DECIDED JUNE 1, 1995

Before POSNER, *Chief Judge*, and FAIRCHILD and KANNE, *Circuit Judges.*

POSNER, *Chief Judge.* A Wisconsin family-court judge, as authorized by Wisconsin law, Wis. Stat. §§ 757.70, 767.19(2); *Forsythe v. Family Court Commissioner*, 388 N.W.2d 580 (Wis. 1986), refused to permit David Nowicki to attend or tape record two custody hearings before her because he was neither a party to the proceedings nor an attorney for any of the parties. Nowicki claims, in this suit for damages and for injunctive and declaratory relief that he has brought against the judge under 42 U.S.C. § 1983 in both her personal and official capacity, that her

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refusal violates a number of his federal constitutional rights. Nowicki is proceeding pro se, and the district court, acting on its own initiative, dismissed the complaint (and the suit) for want of federal jurisdiction before any responsive pleading by the defendant. Insofar as the suit sought damages from the judge, the dismissal was of course correct and the judge's error in dismissing a suit on his own initiative without notice to the plaintiff, *Ricketts v. Midwest National Bank*, 874 F.2d 1177, 1183-85 (7th Cir. 1989), was harmless, since no amendment to the complaint could have cured the infirmity in the claim of damages against the judge. Her act of which Nowicki complains was judicial, and judges have absolute immunity from suits for damages that complain of their judicial acts. *Forrester v. White*, 484 U.S. 219 (1988); *Stump v. Sparkman*, 435 U.S. 349 (1978). That disposes of the claim for damages against the judge in her personal capacity. The claim for damages against her in her official capacity is barred by the sovereign immunity of her employer, the State of Wisconsin. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989); *Wisconsin Hospital Ass'n v. Reivitz*, 820 F.2d 863, 867 (7th Cir. 1987). There is authority that a paid case cannot be dismissed, no matter how manifestly frivolous, before the summons is issued. E.g., *Butler v. Leen*, 4 F.3d 772 (9th Cir. 1993) (per curiam). We don't quite see why, *Wartman v. Branch 7*, 510 F.2d 130, 134 (7th Cir. 1975) (concurring opinion), but will not pursue the question since a summons did issue.

The dismissal of the injunctive and declaratory portions of the suit is more problematic. The only facts we have to go on are those alleged in the complaint. According to them, Mr. Nowicki is a paralegal and a founder and member of an organization called "Divorced Dads Against Discrimination (DDAD)," which seeks to uphold the rights of fathers. When retained in his capacity as a paralegal by another member of the organization to assist in a custody dispute or other dispute in which a father's rights are in issue, Nowicki charges the member $40 an hour for his services. Randy Weishar and Richard Grabczyk,

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two members of DDAD, hired Nowicki to assist them in their custody disputes. By excluding Nowicki from their hearings, the judge prevented him from rendering the services that he had contracted to render Weishar and Grabczyk. The consequence was to impose a financial loss on Nowicki and to deprive Weishar and Grabczyk of assistance they need in order to prevail in their custody disputes with their ex-wives. We do not know the status of the custody proceedings. Although Nowicki brought this suit two years ago and the Weishar and Grabczyk custody proceedings had begun at least a year earlier, a custody battle can continue until a child reaches adulthood. For all we know, the proceedings involving Nowicki's clients are still going on.

Insofar as the suit seeks relief on *their* behalf, it is plainly improper. Even if the exclusion of Nowicki somehow infringed a federal right of either of his clients, Nowicki cannot enforce the rights of other people as their representative. *Lugan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137-38 (1992); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982); *United States ex rel. Mosay v. Buffalo Brothers Management, Inc.*, 20 F.3d 739, 742 (7th Cir. 1994). And if the *Rooker-Feldman* doctrine applies to interlocutory rulings—an unsettled question, *Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir. 1995)—he cannot ask a lower federal court to review the ruling of a state court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995). Were the state a party to the custody proceedings, the suit would also be barred by the *Younger* doctrine. *Younger v. Harris*, 401 U.S. 37 (1971); *Moore v. Sims*, 442 U.S. 415, 423 (1979); *Brunken v. Lance*, 807 F.2d 1325, 1330 (7th Cir. 1986). But, so far as appears, it is not a party. Conceivably, the suit might also be barred by the doctrine of federal abstention in domestic relations cases, which although traditionally a limitation of the federal diversity jurisdiction, *Ankenbrandt v. Richards*, 112 S. Ct.

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2206 (1992), was interpreted in *Allen v. Allen*, *supra*, 48 F.3d at 261-62, as a general bar to federal courts' adjudicating divorce, alimony, and custody proceedings. But *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 558 (7th Cir. 1986), which *Allen* did not cite, had taken a contrary view.

None of the principles that we have mentioned thus far is a bar to Nowicki's suit insofar as he seeks admittance to custody hearings for personal financial gain. In that respect the suit is no different from a suit by a newspaper to be allowed, on First Amendment grounds, into a closed judicial hearing. Such suits are commonplace. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994). And even if the custody hearings involving Nowicki's clients are over with (which we do not know), the suit is not moot, because he anticipates further occasions on which he will want to participate in a custody hearing. He alleges that the judge's policy is to close custody hearings to the extent allowed by Wisconsin law. If that is indeed her policy she will exclude him on all future occasions.

It remains unclear just how his federal rights might have been violated by the state judge's action. Suppose an expert witness were excluded by a state judge on state-law grounds from testifying in a case and as a result lost a fee and anticipated losing more fees in future cases before this judge. The witness might have some remedy under state law—in fact Nowicki could have sought, and for all we know may still be able to seek, a writ of prohibition in state court against the judge who excluded him, see Wis. Stat. §§ 781.01 *et seq.*; *State ex rel. Newspapers, Inc. v. Circuit Court*, 221 N.W.2d 894, 897 (Wis. 1971); *State ex rel. Storer Broadcasting Co. v. Gorenstein*, 388 N.W.2d 633, 635-36 (Wis. App. 1986)—but what federal right of the witness's would have been violated?

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There are two possibilities, both of which are at least implicit in the complaint. One is that the judge's *policy* (as distinct from an ad hoc ruling in a particular case) arbitrarily deprives Nowicki of his liberty to pursue his occupation as a paralegal, in violation of the due process clause of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 572-74 (1972); *Bernard v. United Township High School District No. 30*, 5 F.3d 1090, 1092 (7th Cir. 1993); *Bigby v. City of Chicago*, 766 F.2d 1053, 1059 (7th Cir. 1985). The second possibility, which relates more to Nowicki's role in DDAD than to his occupation as a paralegal, is that the policy deprives him of the limited right (to which we have already alluded), held implicit in the First Amendment, to observe trials. Besides the cases cited earlier, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 and n. 17 (1980); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-09 (7th Cir. 1984).

The first of these theories is highly dubious. Not only is the regulation of proceedings in state court the business of the states unless a challenged regulation contravenes a particular federal right. But also Nowicki's business—the rendering of "paralegal" services *directly to clients* rather than to lawyers—looks like nothing so much as the unauthorized practice of law. One Wisconsin judge has characterized Nowicki's activity in just those terms, precipitating another suit, *Nowicki v. Ullsvick*, No. 94-1409 in this court, where his appeal from the dismissal of that suit is pending. Nowicki's second theory has no obvious infirmity, however, and so his suit is not frivolous, except in the respects discussed at the beginning of this opinion. Dismissal of the suit in its entirety was therefore premature. *Neitzke v. Williams*, 490 U.S. 319, 327 n. 6 (1989); *Gammon v. GC Services Limited Partnership*, 27 F.3d 1254 (7th Cir. 1994); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988).

AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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App 4-1

United States District Court
Eastern District of Wisconsin

Case No. 93-C-779

David A. Nowicki,
Plaintiff,

v.

Lucy Cooper,
Defendant.

ORDER

David A. Nowicki, who claims to be a "notary public and independent paralegal," has brought this action against a Milwaukee County (Wisconsin) Family Court Commissioner for violating his civil rights by not allowing him to tape record domestic relations hearings involving nonparties to this case.
He seeks monetary and injunctive relief from the Commissioner in her individual and official capacities pursuant to 42 U.S.C. & 1983.

Having reviewed the complaint, the court dismisses all claims against the Defendant in her personal capacity.

Court commissioners are judicial officers who exercise discretion when carrying out their official duties, and, as such, are absolutely immune from suits for money damages based upon actions taken while conducting judicial hearings. See generally Stump v. Sparkman, 435 U.S. 349 (1978). See also Antoine v. Byers & Anderson, Inc., 113 S. Ct. 2167 (1993).

Nowicki is also asking this court to grant prospective declaratory and injunctive relief which would, in effect, overturn the court commissioner's rulings. The Plaintiff alleges that his alleged constitutional injuries occurred within the context of state proceedings which are ongoing. Therefore, on principles of comity and in the absence of any allegation that state procedures are inadequate, this court will abstain from hearing Nowicki's claims for declaratory and injunctive relief. See Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 17 (1986).

For these reasons, the court ORDERS that this action is dismissed.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 58, the Clerk of Court shall enter a Final Judgement of dismissal as a separate document.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 29th Day of July, 1993.

Thomas J. Curran
United States District Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 95-660

(2)

In the

Supreme Court of the United States

October Term, 1995

David A. Nowicki, Petitioner,

v.

Lucy Cooper, Respondent.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Seventh Circuit.

Brief in Opposition to Petition

Robert G. Ott
Milwaukee County Courthouse
901 N. Ninth Street
Milwaukee, WI 53233
414-278-4302

Attorney for Respondent

BEST AVAILABLE COPY

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QUESTION PRESENTED

Respondent, Assistant Family Court Commissioner Lucy Cooper (Commissioner Cooper) objects to the form and substance of the "Questions Presented" as set forth in the petition for writ of certiorari. The only question fairly presented is whether the respondent, an assistant family court commissioner, is immune from a claim for money damages under the doctrine of absolute judicial immunity when that claim is based upon her exercise of discretion in (1) excluding the petitioner (who was neither a party nor an attorney for any party) from a hearing on a post-divorce motion concerning child custody, and prohibiting him from making an audio recording of the proceeding, and (2) limiting the participation of the petitioner (who was neither a party nor an attorney for any party) in a hearing on a post-divorce motion concerning child support, and prohibiting him from making an audio recording of the proceeding.

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OPINIONS BELOW

The petitioner's action was dismissed *sua sponte* by the Honorable Thomas J. Curran, United States District Judge in the Eastern District of Wisconsin, in an order dated July 29, 1993. The petitioner appealed that order to the United States Court of Appeals for the Seventh Circuit. In a decision rendered June 1, 1995, that court affirmed in part and reversed in part and remanded the case to the District Court. A copy of that decision is appended to the petition for writ of certiorari. In particular, the Court of Appeals upheld the District Court insofar as the District Court dismissed the petitioner's claims for damages on the grounds of absolute judicial immunity. It appears that the petitioner seeks Supreme Court review of that aspect of the decision of the Court of Appeals.

At present, what remains of the petitioner's action in the District Court has been referred to the Bankruptcy Court by a *sua sponte* order of the District Court dated August 30, 1995. That order recites that the petitioner has filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code and directs that the matter be referred to the Bankruptcy Court so that the trustee can determine whether the action should be maintained, pursuant to 11 U.S.C. ss. 704 and 1302. Respondent has received no notice of any activity in or by the Bankruptcy Court concerning this action.

JURISDICTION

The Supreme Court has jurisdiction to entertain the petition for writ of certiorari to review the decision of the Court of Appeals, despite the fact that no final judgment of decree has been entered in that court or in the District Court in this action. 28 U.S.C. ss. 1254 and 210(e).

However, respondent respectfully submits that there are no grounds to warrant the Supreme Court's exercise of that jurisdiction in this case. There are no compelling reasons to grant the writ. This case satisfies none of the criteria in Rule 10 which are illustrative of the character of the reasons which the Court is inclined to consider in deciding whether to grant the writ. On the contrary, the decision of the Court of Appeals on the question of the petitioner's damage claims is squarely in accord with numerous decisions of the Supreme Court and the Courts of Appeal on the subject of judicial immunity. Even if the Court of Appeals were arguably in error as to the meaning or application of that doctrine, which it is not, the petitioner cannot show that his case is of such imperative public importance that it requires immediate determination in the Supreme Court under the standard set forth in Rule 11.

STATEMENT OF THE CASE

Petitioner Nowicki, a self-styled "Notary Public and Independent Paralegal", commenced a civil rights action against Assistant Family Court Commissioner Lucy Cooper, seeking damages as well as injunctive relief, by filing a complaint in the United States District Court for the Eastern District of Wisconsin on July 27, 1993. The gravamen of his complaint is that, in each of two cases in which he was allegedly retained to tape-record proceedings and to provide other less well-defined "paralegal" services to one of the parties in a post-divorce hearing before the Family Court Commissioner, he was prevented from tape-recording the hearing and, in one case, excluded from the hearing room by Commissioner Cooper.

Almost immediately upon the filing of the complaint, the District Court rendered a decision and order dismissing the

complaint. Petitioner appealed that order to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the decision of the District Court with respect to the damage claims but reversed in part and remanded the action for further proceedings on certain of the petitioner's claims for injunctive relief, that court having evidently concluded that the District Court has been too summary in its disposition of that aspect of the petitioner's complaint. The District Court has referred that surviving portion of the complaint to the Bankruptcy Court for assessment by the trustee because the petitioner has filed a petition for relief under Chapter 13 of the Bankruptcy Code.

As a result of the District Court's prompt and summary disposition of this action when it was initially filed and the post-remand suspension of proceedings in that court due to the petitioner's bankruptcy action, there is no factual record in this case. The petitioner's various submissions in this case are full of what purport to be "facts". Some are substantially accurate. Many are not.

The petitioner is, as he describes himself, not an attorney and not a party to either of the family court actions referred to in his petitioner for writ of certiorari. He is associated with an organization known as the "Divorced Dads' Organization". That organization is not recognized by Milwaukee County as a "community resource" within the meaning of s. 767.081(2)(a)3, Wis. Stats. The most charitable description of the petitioner's activities in connection with family court litigation, such as the two cases referred to in his complaint and in his petition for writ of certiorari, is attempting the unauthorized practice of law. See, App. 3-5, Appendix to Petition for Writ of Certiorari (slip opinion of Court of Appeals). Typically, he sells his "paralegal" services directly to litigants and attempts to introduce himself into litigation,

purportedly as an advocate for fathers, in a manner which serves only to inflame the parties and impede resolution of disputes. The Grabczyk case, which is referenced in the petition for writ of certiorari, provides a telling example. That case came before Commissioner Cooper on the motion of the former Mrs. Grabczyk for in an increase in child support, which had remained unchanged for the nearly ten years since the parties' divorce. On the advice of petitioner, Mr. Grabczyk countered that request for an increase in child support with a groundless motion denying paternity of his children, who were, at the time of that motion, 12 and 15 years old.

Petitioner's statement of the case mistakenly alleges that there are other groups which attempt to provide the same "services" as those which the petitioner attempts to provide. There are organizations which serve both men and women and which assist persons of limited means who are proceeding *pro se* in family court actions. However, such organizations provide only form pleadings and instructions. They do not, nor would they be permitted to, appear in court with their clients.

Commissioner Cooper is an assistant family court commissioner for Milwaukee County. In that capacity, she presides over hearings, makes findings, and renders decisions in a wide variety of family court litigation which, either by explicit statutory authority or by delegation of authority by the circuit court, devolve upon the Family Court Commissioner. This includes hearings, such those referenced in the petition for writ of certiorari, involving requests for post-divorce judgment revisions in child support, custody and visitation. Sec. 767.13(5)(b), Wis. Stats.There is no provision for stenographic recording of those hearings.

Commissioner Cooper did forbid the petitioner to make

unofficial tape recordings of hearings on two occasions, as alleged by the petitioner. She also excluded the petitioner from her hearing room on one of those occasions. For reasons more fully described in the Argument portion of this brief, those actions were not "ministerial" but involved the exercise of judicial discretion and were well within the ambit of her judicial functions.

ARGUMENT

Commissioner Cooper is immune from a claim for money damages based on allegations that she forbad the petitioner to tape record proceedings or otherwise limited his participation in hearings in which he was neither a party nor an attorney for a party.

Wisconsin family court commissioners are entitled to absolute judicial immunity. It is well settled that judges are absolutely immune from claims for money damages, including claims under 42 U.S.C. s. 1983, arising from acts done in the exercise of a judge's judicial function. Pierson v. Ray, 386 U.S. 547 (1967). It is likewise well settled that the doctrine of absolute judicial immunity protects other public officers who, while not technically classified as "judges", perform the same essential functions as judges. In Butz v. Economou , 438 U.S. 478 (1978), the court extended the absolute immunity doctrine articulated in Pierson to hearing examiners and administrative law judges when they are acting in a judicial capacity, based upon the "functional comparability" of those officers to judges.

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is "functionally comparable" to that of a judge. His powers are

> often, if not generally comparable to those of a trial judge. He may issue subpoenas, rule on proffers of evidence, regulate the conduct of the hearing, and make or recommend decisions.

Butz, 438 U.S. 478, 513. The Court might just as aptly use that language to describe the functional comparability of judges and family court commissioners in actions affecting the family under ch. 767, Wis. Stats.

Whether an act is "judicial", and therefore falls within the ambit of absolute judicial immunity, depends upon the nature and the function of the act, rather than the specific act complained of. That is so regardless of whether the specific act complained of was in error, in excess of the judge's authority, or evinces malice or other corrupt motives. Mireles v. Waco, 502 U.S. 9, 12 (1991).

Whether the nature and function of an act is "judicial" relates to whether it is a function normally performed by a judge and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. Stump v. Sparkman, 435 U.S. 349, 362 (1978).

Controlling the conduct of a hearing, which would include deciding who other than the parties and their counsel shall be admitted to the hearing and regulating the behavior of those in attendance, is quintessentially a judicial function. Certainly it is a function normally performed by a judge. No one with the slightest actual experience with trial-level judges or court commissioners would ever suggest during a hearing that anyone other than the judge or commissioner is or should be in charge. When a judge or commissioner runs a hearing, those whose conduct the judge or commissioner directs are

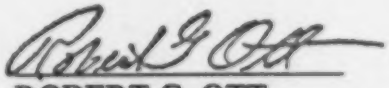
obviously dealing with him or her as a judge or commissioner.

Under the law applicable to the specific judicial actions complained of, those actions are by definition "judicial". The Wisconsin supreme court has expressly committed the regulation of tape-recording to the sound discretion of the family court commissioners. Forsythe v. Family Court Comm'r, 131 Wis. 2d 322, 388 N.W.2d 580 (1986). Whether in a particular instance that discretion is properly exercised is, for purposes of a judicial immunity analysis, beside the point. The Wisconsin supreme court has established that the nature and function of the act is judicial. The Wisconsin statutes give to the family courts and commissioners the authority to close hearings to all but the parties, their counsel and guardians ad litem, on their own motion or on the motion of any party. Sec. 767.19(2), Wis. Stats. Whether such a motion should be granted in a particular case is not relevant to a judicial immunity defense. The nature and function of the act of controlling admission to a family court hearing is, according to the Wisconsin legislature, judicial.

CONCLUSION

For the foregoing reasons, Commissioner Cooper is absolutely immune from any claim for money damages arising from her decisions to exlude the petitioner from a hearing or to forbid him from tape recording hearings. She therefore respectfully urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,



ROBERT G. OTT
Corporation Counsel